In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1660

TERRELL DON HUTTO, SUB NOM. JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION; MARSHALL N. RUSH, CHAIRMAN, ARKANSAS BOARD OF CORRECTION; EULA DORSEY, VICE-CHAIRMAN, ARKANSAS BOARD OF CORRECTION; THOMAS H. WORTHAM, M.D., SECRETARY, ARKANSAS BOARD OF CORRECTION; RICHARD E. GRIFFIN, MEMBER, ARKANSAS BOARD OF CORRECTION; AND JOHN ELROD, MEMBER, ARKANSAS BOARD OF CORRECTION,

Petitioners,

vs.

ROBERT FINNEY, ET AL.,

Respondents.

BRIEF OF THE STATE OF MISSISSIPPI, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The United States District Court for the Northern District of Mississippi and the Court of Appeals for the Fifth Circuit have entered orders or judgments holding

that plaintiffs in civil rights actions are entitled to monetary awards for attorney's fees from funds of the State of Mississippi on the basis of the provisions of P.L. 94-559, the Civil Rights Attorney's Fees Award Act of 1976, despite the State's immunity to suit or monetary judgment provided by the Eleventh Amendment to the *Constitution of the United States*.[1] In addition, there are a number of other cases in which prevailing plaintiffs in civil rights actions have motions pending for the awarding of attorney's fees against State funds on the basis of P.L. 94-559. Resolution of the questions of whether P.L. 94-559 authorizes the awarding of attorney fees to be paid by a State, which was not a party to the suit, and of whether the Eleventh Amendment to the *Constitution* absolutely bars the award of attorney fees to be paid by a State, which are two of the questions presented by this appeal, is, therefore, of significant interest to amicus.

SUMMARY OF ARGUMENT

P.L. 94-559, the Civil Rights Attorney's Fees Award Act of 1976, hereinafter sometimes referred to as "the Act" does not amend the definition of a "person" as used in the context of 42 U.S.C. § 1983 to include or encompass a State; nor does it by its terms establish jurisdiction for

1. *Gates* v. *Collier*, 70 F.R.D. 341 (D.C., N.D. Miss., 1976), *aff.*, 559 F.2d 241 (5th Cir., 1977), petition for rehearing *en banc* pending disposition of this case, $47,750.00; *Norwood* v. *Harrison*, 410 F.Supp. 133 (D.C., N.D. Miss., 1976), pending on appeal to the Court of Appeals for the Fifth Circuit, No. 76-1865, $23,852.00; *Rainey* v. *Jackson State College*, 551 F.2d 672 (5th Cir., 1977), petition for rehearing *en banc* pending, $11,182.50; and *Stevenson* v. *Reed*, ... F.Supp. ..... (D.C., N.D. Miss., No. GC 73-76-K, July 6, 1977), on appeal to the Court of Appeals for the Fifth Circuit, No. 77-2791, $4,925.00.

the joinder of a State as a party to any proceeding commenced, maintained, or prosecuted pursuant to it. Each of these factors, separately and independently, requires a holding that the Act does not authorize the awarding of attorney fees to be paid by the State of Arkansas in this case.

The failure of the Act to amend 42 U.S.C. § 1983 so as to make the State a suable entity thereunder demonstrates a lack of "threshold . . . congressional authorization" to allow a State to be sued as a defendant, which this Court held to be a prerequisite to the obtaining of a monetary judgment against a State in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452. The requisite "congressional authorization" to sue a State cannot be gleaned or inferred from the legislative history of the Act, but can only be shown by explicit, unambiguous statutory language incorporated within it.

The failure of the Act by its terms to vest jurisdiction in the Courts of the United States to join a State as a party defendant in a proceeding commenced, maintained, or prosecuted pursuant to it has the inevitable consequence of making the State of Arkansas an absent indespensable party defendant to this proceeding, which, if affirmed by this Court, would result in the entry of a monetary judgment to be paid by the State. If the Act should be construed so as to legislatively deem that Arkansas is not an indispensable party to a proceeding which would result in the rendition of a monetary judgment against it, then the Act would be void as an invasion of the Judiciary Power vested in the Courts of the United States by Article III of the *Constitution of the United States*, and of the rights reserved to Arkansas by the Tenth Amendment to the *Constitution of the United States*.

ARGUMENT

I

The Civil Rights Attorney's Fees Award Act of 1976 Does Not Operate to Abrogate the Immunity of the State of Arkansas in This Case

The Eleventh Amendment of the *Constitution of the United States* provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Although the Eleventh Amendment does not specifically prohibit the exercise of federal jurisdiction in a suit brought against an unconsenting State by one of its own citizens, this Court has held that the Amendment does prohibit federal jurisdiction in such cases. *Hans* v. *Louisiana*, 134 U.S. 1. The opinion of the Eighth Circuit from which this appeal is taken[2] held that the enactment by Congress of the Act abrogated the Eleventh Amendment immunity of Arkansas.

It is clear from a reading of the Act and an understanding of the exacting standards which this Court has established in order to effect abrogation of a State's immunity that the decision of the Eighth Circuit is erroneous and should be reversed.

P.L. 94-559 provides:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

2. *Hutto* v. *Finney*, 548 F.2d 740.

The basis upon which Respondents were the prevailing parties in the district court and the Court of Appeals for the Eighth Circuit, was a determination by those Courts that Petitioners had deprived Respondents of rights guaranteed by the provisions of 42 U.S.C. § 1983. This Court has held that States or municipalities are not "persons" within the context of § 1983 and cannot be sued thereunder. *Monroe* v. *Pape*, 365 U.S. 167.

It is clear that the Act does not provide that a monetary judgment might be obtained against a State thereunder; nor does it amend 42 U.S.C. § 1983 so as to bring States within its ambit as suable entities. Thus, there is a complete lack of "congressional authorization" to sue a State which this Court held in *Fitzpatrick, supra*, to be the essential basis for the maintenance of a suit against a State. The Eighth Circuit, in the opinion below, articulated no statutory foundation for the necessary Congressional authorization but alluded to the report of the Senate Judiciary Committee which accompanied S. 2278, which was enacted as the Act.[3] The Eighth Circuit did not particularize the precise language of the Report of the Senate Judiciary Committee upon which it relied to find Congressional authorization to sue a State, but it apparently had reference to the following language upon which the Fifth Circuit relied in *Gates* v. *Collier, supra*:

3. 548 F.2d, p. 742.

As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).[4]

Whatever uses might properly be made of legislative history, it cannot be properly utilized as the basis for finding Congressional authorization to sue a State, particularly in the circumstances of this case. This Court has stated with clarity that courts can look only to the plain, unambiguous and explicit language embodied in a statute enacted by Congress in determining whether Congress has authorized a State to be sued in a particular case. *Employees* v. *Missouri Public Health Department*, 411 U.S. 279; *Fitzpatrick* v. *Bitzer*, *supra*. This Court held that there was no sufficient evidence of Congressional authorization to sue a State in *Employees*, *supra*, and that there was sufficient evidence to demonstrate Congressional authorization to sue a State in *Fitzpatrick*. A brief analysis of these cases demonstrates the exacting standards to which this Court has adhered in determining whether there is a basis for finding Congressional authorization to sue. The decision in *Employees* turned on whether the 1966 Amendments to the Fair Labor Standards Act effected abrogation of the immunity of the State of Missouri to suit. Prior to the 1966 Amendments, § 3(d) of the Fair Labor Standards Act defined an "employer" so as to exclude any State or political subdivision of a State, but the 1966 Amendment provided that the § 3(d) exclu-

4. 559 F.2d, p. 243.

sion would not apply to employees of a State employed in certain institutions. The plaintiffs who brought suit in *Employees* were employed in institutions of the State of Missouri which were brought under coverage of the F.L.S.A. Amendments of 1966. However, Congress, in enacting the 1966 Amendments to the F.L.S.A. did not amend § 16(b), which provided that legal action might be instituted against "any employer" who violates certain provisions of the F.L.S.A. This Court held that the fact that Congress did not amend § 16(b) so as to specifically include a State within the all-inclusive term "any employer" was the determining factor in holding that Congress had not intended to abrogate the State's immunity to suit. In discussing *Employees*, this Court subsequently stated that the case "involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities."[5]

In *Fitzpatrick*, this Court considered the question of whether the 1972 Amendments to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) enacted by Congress, provided sufficient basis for finding a Congressional authorization to sue a State. The 1972 Amendments expressly provided that those subject to suit were "governments, governmental agencies [and] political subdivisions." The express exclusion of a State or political subdivision, although provided in § 701(b) of Title VII, was stricken by § 2(2) of the 1972 Amendments, and § 2(5) of the 1972 Amendments. The 1972 Amendments amended § 701 of Title VII to include within the definition of "employee" those individuals "subject to the civil service laws of a State government, etc." This Court held in *Fitzpatrick* that the clear, unambiguous, express, statutory pro-

5. *Edelman* v. *Jordan*, 415 U.S. 651, 672.

visions of the 1972 Amendments did provide sufficient basis for finding Congressional authorization to sue a State. This is the high standard which this Court has properly set for finding Congressional intent to abrogate the immunity of the States. The Civil Rights Attorney's Fees Award Act of 1976 falls far short of meeting this standard.

It is of more crucial importance that the high threshold of explicit Congressional statutory authorization be found in order to abrogate the immunity of a State at the present time than at the time of the decision of this Court in *Employees, supra.* The reason for this is that this Court is now apparently applying different standards and criteria in deciding whether abrogation has been effectuated. In *Edelman* v. *Jordan*, 415 U.S. 651, this Court reviewed its decisions in *Employees* and other cases involving acts of Congress based upon the Commerce Power and the Compact Power. This Court summarized the formulation of its standard for determining the question of abrogation or waiver of immunity as follows:

> The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, *and* whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.[6] [Emphasis added]

In its decision in *Fitzpatrick*, which involved an Act of Congress based upon § 5 of the Fourteenth Amendment, the only test applied is that of Congressional authorization to sue a State, with no linkage to an implied waiver by the State.

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6. 415 U.S., p. 672.

In these circumstances, in which abrogation of a State's immunity might be accomplished unilaterally by an Act of Congress, surely the highest standards of explicit statutory authorization to sue a State must be clearly evident. The use of legislative history to unilaterally effect abrogation should not be permitted. The power of Congress to unilaterally abrogate the immunity of a State to suit for monetary judgment is an awesome one. Courts should not depart from the text of an Act of Congress in order to find such a power. In *Skehan* v. *Board of Trustees of Bloomsburg State*, 436 F.Supp. 657, 666-667 (D.C., M.D. Pa., 1977), the Court made a clear analysis of the issues discussed above and cited *Employees* for the necessity of explicit statutory language subjecting the States to liability for attorney's fees in order to effect abrogation of the State's immunity.

II

The State of Arkansas Is an Absent Indispensable Party to This Action

The failure of the Act by its terms to vest jurisdiction in the Courts of the United States to join a State as a party defendant in a proceeding commenced, maintained, or prosecuted according to it has the inevitable consequence of making the State of Arkansas an absent indispensable party to this proceeding. As noted in Argument I, Arkansas is not a party to this case, nor could it be made a party. This defeats Federal jurisdiction, due to lack of an indispensable party defendant.

This Court has formulated and adhered to the principle that the rights, duties, obligations and liabilities of a State will not be adjudicated when the State is not a party to the proceedings. *Durfee* v. *Duke*, 375 U.S. 106, 115; *Arkansas* v. *Tennessee*, 246 U.S. 158, 176; and *Western Union*

Telegraph Company v. *Pennsylvania*, 368 U.S. 71, 75. This Court in *Western Union Telegraph Company, supra*, succinctly stated the proposition as follows:

> But New York was not a party to this proceeding and could not have been made a party, and, of course, New York's claims could not be cut off where New York was not heard as a party.[7]

This salutary rule, which gives States the right to be heard before monetary judgments are entered against them, would be grossly violated if the decision of the Eighth Circuit, from which this appeal is taken, is allowed to stand.

More specifically, this Court follows the doctrine that a State is an indispensable party to an action which seeks to recover a monetary judgment from its fisc. *Christian* v. *Atlantic and North Carolina Railroad Company*, 133 U.S. 233; *Belknap* v. *Schild*, 161 U.S. 11. Indicative of the strong position taken by this Court is the following language from *Christian, supra*:

> How the dividends due to the State can be seized and appropriated to the payment of the bonds, or how the stock held and owned by the State can be sold and transferred through the medium of a suit in equity, without making the State a party to the suit, it is difficult to comprehend. The general rule certainly is, that all persons whose interests are directly to be affected by a suit in chancery must be made parties.
>
> . . .
>
> The State has a direct interest to be affected by such a proceeding. The proposal is to take the property of the State and apply it to the payment of its debts

7. 368 U.S., p. 75.

> due to the plaintiffs, and to do it through the instrumentality of a Court of equity.
>
> . . .
>
> There is a class of cases, undoubtedly, in which the interests of the State may be indirectly affected by a judicial proceeding without making it a party.
>
> . . .
>
> Such cases do not affect the present, in which the object is to take and appropriate the State's property for the purpose of satisfying its obligations.[8]

And, in *Belknap* v. *Schild, supra*, the Court expounded upon the rule, as follows:

> In a suit to which the State is neither formally nor really a party, its officers although acting by its order and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion and in violation of the Constitution or laws of the United States.
>
> . . .
>
> But no injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party.[9]

8. 133 U.S., pps. 241, 243, 244.

9. 161 U.S., p. 18.

This Court has interpreted revised Rule 19 of the Federal Rules of Civil Procedure relating to parties, and synthesized the provisions of Rule 19 with the line of decisions relating to necessary and indispensable parties. *Provident Bank and Trust Company* v. *Patterson*, 390 U.S. 102. This Court made it plain that the line of cases beginning with *Shields* v. *Barrow*, 17 How. 130, and including the cases above cited, dealing with necessary and indispensable parties is still the law, and that Rule 19 is to be used as a guide in interpreting the principles enunciated by *Shields* and its progeny in specific cases.

It is clear that the State of Arkansas is an absent indispensable party to this action which would result in a monetary judgment against its funds.

III

The Construction of the Civil Rights Attorney's Fees Award Act of 1976 Made by the Court Below Renders the Act Void As an Invasion of the Judiciary Power and of the Rights Retained by the State of Arkansas by the Tenth Amendment to the Constitution

The Act, by its terms, does not define the State of Arkansas as a "person" which can be sued as a defendant under the provisions of 42 U.S.C. § 1983; it does not, by its own terms, provide for the joinder of Arkansas as a defendant in this action; and it does not, by its terms, provide that a monetary judgment may be recovered thereunder from the funds of the State of Arkansas. That much is clear.

As noted previously in Argument I, the Eighth Circuit relied upon language contained in the report of the Senate Judiciary Committee, presumably the language previously cited in this brief, as the basis for holding the State of

Arkansas liable for a monetary judgment in the sum of $20,000. If the gloss of the language of the report of the Senate Judiciary Committee is to be read into the terms of the Act, then the Act is rendered void as an invasion of the Judiciary Power and of the rights retained by Arkansas by the Tenth Amendment to the *Constitution*. For the convenience of the Court, we herewith requote the language from the committee report:

> As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is named a party).

The effect of this language, if read into the terms of the Act, would be to create an irrebuttable presumption that a State is liable for a monetary judgment for attorney's fees whenever one of its officials is the losing party in an action brought under various Federal civil rights statutes. Such language could also be construed as presumptively "deeming" liability to monetary judgment on the part of a State regardless of the facts of the case.

This Court has struck down efforts of Legislatures to create irrebuttable presumptions of liability in civil cases. *Lindsley* v. *National Carbonic Gas Company*, 220 U.S. 61, and *Western and Atlantic Railroad* v. *Henderson*, 279 U.S. 639. In upholding the validity of a statutory presumption and distinguishing a permissible presumption from one which the legislative branch was forbidden to make, this Court stated:

"it establishes a rebuttable presumption but neither prevents the presentation of other evidence to overcome it nor cuts off the right to make a full defense." *Lindsley* v. *National Carbonic Gas Co., supra,* at page 82.

And, in *Western and Atlantic Railroad* v. *Henderson, supra,* this Court stated a similar rule. *Id.*, p. 642. Although *Lindsley* and *Western and Atlantic Railroad* pertained to legislative acts of State Legislatures, this Court has held that the same due process standards under the Fifth Amendment apply to Acts of Congress which attempted to create irrebuttable presumption of civil liability or to "deem" a party to be civilly liable. *Heiner* v. *Donnan,* 285 U.S. 312, 326, 329.

The State of Arkansas may or may not be entitled to due process of the law under the Fifth Amendment. But in this case, Arkansas, a sovereign State of the Union, has had no process, due or otherwise. It has had no opportunity to present its defense, including lack of jurisdiction under Article III of the *Constitution* and its immunity to suit under the Eleventh Amendment, to this monetary judgment which the Court of Appeals has ordered to be entered against it.

Surely, the right to have its immunity abrogated only by the most explicit unambiguous statutory language embodied in an Act of Congress and the right to be heard and present its defenses prior to an entry of a monetary judgment against it are among "the attributes of sovereignty attaching to every state government which may not be impaired by Congress", which this Court has recently held inhere in each State by operation of the Tenth Amendment to the *Constitution. National League of Cities* v. *Usery,* 426 U.S. 833, 845.

In *National League of Cities, supra,* this Court made it manifest that the obituary notice which some scholars and commentators had published for the 10th Amendment to the *Constitution* were premature. This Court sharply rejected the notion that the 10th Amendment was a mere "truism" or surplusage. Rather, the Court reaffirmed that that Amendment is a positive statement that certain rights of the States cannot be transgressed by Congress or any other Branch of the Federal Government.

CONCLUSION

Amicus submits that P.L. 94-559 does not authorize recovery of attorney's fees against a State; that the State of Arkansas is an absent indispensable party to these proceedings; and that the construction of P.L. 94-559 made by the Eighth Circuit would render that Act of Congress invalid.

Dated November 28, 1977.

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